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No. 84-_____

Office-Supreme Court, U.S.
FILED
JUL 12 1985
ALEXANDER L. STEVAS,
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

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FIRST CITIZENS BANK OF BILLINGS,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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July, 1985

## QUESTIONS PRESENTED

1. Can Congress retroactively confer subject-matter jurisdiction upon an action that otherwise lacks the requirement of case or controversy?

2. Can Congress bestow constitutionality upon an improper statutory scheme simply by declaring its subsequent approval of all actions taken pursuant to the Act?

## PARTIES TO THE PROCEEDING

The names of all parties to the proceedings are contained in the caption of the case in this Court.

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Petitioner First Citizens Bank respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 16, 1985.

## OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 758 F.2d 397 (9th Cir. 1985). This opinion is reproduced in Appendix A. The opinions of the United States District Court for the District of Montana, issued by Judge Battin, unpublished, (D. Mont. 1983 and 1984), appear in Appendix B and C.

## JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered on April 16, 1985, and this Petition for Certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under the provisions of 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are as follows:

The Fifth Amendment to the United

States Constitution, which in pertinent part provides:

> No person shall ... be deprived of life, liberty, or property, without due process of law; ...

The Reorganization Act of 1977, which provided in pertinent part:

> (a) except as otherwise provided under subsection (c) of this section, a reorganization plan is effective at the end of the first period of sixty calendar days of continuous session of Congress after the date on which the plan is transmitted to it unless, between the date of transmittal and the end of the sixty-day period, either House passes a resolution stating in substance that the House does not favor the reorganization plan.

5 U.S.C.S. 906 (1980) (1984 Supp.).

Public Law 98-532, 98 Stat. 2705, signed by the President on October 19, 1984, which states:

> SECTION 1. The Congress hereby ratifies and affirms as law each reorganization plan that has, prior to the date of enactment of this Act, been implemented pursuant to

> the provisions of chapter 9 of title 5, United States Code, or any predecessor Federal reorganization statute.
>
> SECTION 2. Any actions taken prior to the date of enactment of this Act pursuant to a reorganization plan that is ratified and affirmed by section 1 shall be considered to have been taken pursuant to a reorganization expressly approved by Act of Congress.

28 U.S.C § 1345, which provides as follows:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

## STATEMENT OF THE CASE

This case involves the questions of whether Congress can retroactively confer justiciability by post-trial imposition of subject matter jurisdiction on an action that was otherwise without a proper party plaintiff and whether Congress has surpassed the

bounds of constitutional propriety with its after-the-fact attempt to bestow validity on an otherwise unconstitutional statute.

This litigation was initiated on April 2, 1980, by the Equal Employment Opportunity Commission (hereinafter "EEOC") against First Citizens Bank of Billings (hereinafter "First Citizens") seeking to enforce the Equal Pay Act provisions of the Fair Labor Standards Act, as amended, 29 U.S.C. §§ 201-219. The EEOC based its claim to subject matter jurisdiction in the district court on 28 U.S.C. § 1345, which confers jurisdiction in federal court when federal agencies are "expressly authorized to sue by Act of Congress."

The EEOC based its enforcement and jurisdictional authority on Section 1 of Reorganization Plan No. 1 of 1978, 92 Stat. 3781, which amended 29 U.S.C. §§ 216(c) and 217, the statutory authority that had allowed

the Secretary of Labor to enforce the Equal Pay Act. This jurisdictional plan, Reorganization Plan No. 1 of 1978, was prepared by the Executive branch of the government pursuant to the Reorganization Act of 1977, 5 U.S.C. § 901 et seq. Under this Act, the President was given authority to reorganize the Executive branch by presenting reorganization plans to Congress, which either house of Congress could veto by a resolution passed by a majority vote.

Reorganization Plan No. 1 of 1978 was not objected to by either house of Congress, and was therefore "enacted" into law. Section 1 of this Plan transferred the enforcement of the Equal Pay Act from the Labor Department to the EEOC. See 1978 U.S. Code Cong. & Ad News 9799, reprint of Reorganization Plan No. 1 of 1978. A similar one-house legislative veto device was declared unconstitutional by this Court in Immigra-

tion and Naturalization Service v. Chadha, 462 U.S. 919, 103 S. Ct. 2764 (1983). The specific veto provision at issue here was declared unconstitutional by a number of lower federal courts between the times that the district court and the Ninth Circuit made their decisions in this case.

The specific question of the EEOC's enforcement authority or lack of subject matter jurisdiction was not raised at the district court, although a motion to dismiss for failure to state a claim was filed by First Citizens and dismissed by the court. District Judge James F. Battin ruled against First Citizens and issued a judgment in the amount of $75,007.34, which, upon rehearing, was reduced to $13,118.88. The district court's order was appealed by both the EEOC and First Citizens to the Ninth Circuit Court of Appeals. First Citizens asserted, in this appeal, that the action should be remanded to

district court with the directive that it be dismissed for lack of subject matter jurisdiction because the EEOC's statutory enabling authority, the Reorganization Act of 1977, was unconstitutionally predicated upon a one-house legislative veto. Because it lacked the requisite enforcement authority, the EEOC did not have express authority to sue by Act of Congress, and the district court lacked subject matter jurisdiction over the controversy.

Meanwhile, following submission of the initial brief by First Citizens, Congress enacted a two-paragraph curative statute ratifying and affirming as law all reorganizations accomplished by the President. The Ninth Circuit then declared that the constitutional questions had been answered, stating that the issue had been rendered moot by the Congressional curative statute, and expressly holding that the two-paragraph legislation

bestowed retroactive authority on the EEOC to prosecute any action it had brought. It remanded the matter to the district court with instructions that the court's original judgment in the amount of $75,007.34 be reinstated. This Petition for Writ of Certiorari followed.

## REASONS FOR GRANTING THE WRIT

### I. The Ninth Circuit's opinion on the effect of the curative legislation is in conflict with applicable decisions of this Court that parties cannot be retroactively deprived of substantial rights.

First Citizens presented a constitutional defense to the Ninth Circuit that focused on the jurisdiction of the district court and appellate court to consider the case before it. If the EEOC lacked enforcement authority, as First Citizens contended it did, no case or controversy was presented for adjudication, and the federal courts lacked statutory jurisdiction to hear

the matter because the only jurisdictional basis for this action was 28 U.S.C. § 1345, which confers jurisdiction in federal court when federal agencies are "expressly authorized to sue by Act of Congress." It is axiomatic that if the agency lacked the necessary authority of congress to bring suit, the court was without a jurisdictional basis and no case or controversy was presented to the court for adjudication. A federal court may entertain a controversy only if it is justiciable. Joint Anti-Fascist Refugee v. McGrath, 341 U.S. 123 (1951).

The Ninth Circuit considered this constitutional argument but rejected it, ruling that the retroactive legislation had "mooted" First Citizens' concerns. The Ninth Circuit's decision that the 1984 curative statute fixed any jurisdictional defects in the EEOC's enforcement abilities cited only

one United States Supreme Court decision, Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297 (1937), which it misconstrued; and it completely disregarded the contrary determination of Mr. Justice Holmes in the case of Forbes Pioneer Boat Line v. Board of Comm'rs., 258 U.S. 338 (1922).

Certain curative actions of Congress were upheld in the Swayne opinion, including ratifications of actions that Congress might have originally authorized, Swayne & Hoyt, Ltd. v. United States, 300 U.S. at 301-02; however, as this Court noted in Swayne & Hoyt, Ltd., the corrolary axiom is that the ratification must not "impair...substantial right or equity of appellants," id. at p. 301, as it did in this instance. The Fifth Amendment to the United States Constitution prohibits the deprivation or impairment of substantive rights by post-act ratification. Forbes Pioneer Boat Line v. Board of

Comm'rs., supra. Curative laws may heal irregularities in actions or manners of procedure once jurisdiction is acquired but "they cannot cure the want of authority to act at all." Turpin v. Lemon, 187 U.S. 51, 57 (1902).

At issue in Forbes Pioneer Boat Line v. Board of Commr's., supra, which the Ninth Circuit apparently ignored in its considerations, was the recovery of tolls unlawfully collected from the plaintiff for passage through a canal lock. After the plaintiff had brought suit to recover these tolls, the Florida legislature enacted legislation that purported to validate the past collections. This Court ruled that the legislature could not, in 1919, make the plaintiff pay for passages through the lock before 1917:

> [t]o say that the legislature simply was establishing the

> situation as both parties knew from the beginning it ought to be would be putting something of a gloss upon the facts. We must assume that the plaintiff went through the canal relying upon its legal rights, and it is not to be deprived of them because the legislature forgot.

258 U.S. at 339-40.

In Forbes, just as in this case, the curative legislation fell within the Fifth Amendment exception to congressional curative powers because the substantive rights of the parties were directly impaired by the legislation. In Forbes, the substantive right was the right to recover money that was due at the time the curative legislation was enacted. 258 U.S. at 339. Here, the right of a party to adjudication in a court of competent jurisdiction is at issue. Thus, the Ninth Circuit erred when it gave the curative legislation effect in this litigation and administered retroactive jurisdiction on the

district court.

The conclusion of the Ninth Circuit that jurisdiction had been retroactively bestowed on this litigation should be reviewed by this Court.

## II. The Ninth Circuit's approval of Congress' two-paragraph curative legislation raises an important question of federal law that has not been, but should be, settled by this Court.

The propriety of retroactive legislation has long been a controversy in state and federal courts, including this honorable Court, and judicial consideration of the issue has resulted in a number of contrary decisions. The courts have struggled in an attempt to discern the difference between permissible curative legislation and unconstitutional retroactive legislation. The turmoil created by conflicting case precedent was described by Mr. Justice White

in his dissenting opinion in the recent case of Van Emmerik v. Janklow, 454 U.S. 1131 (1982), where he noted the difficulty in determining whether a curative statute was permissible or impermissible, as is demonstrated by the apparently conflicting decisions in United States v. Heinszen & Co., 206 U.S. 370 (1907), and Forbes Pioneer Boat Line v. Board of Commr's., supra. Mr. Justice White noted that the lower courts were in conflict on this substantial issue of curative legislation, and further, that the earlier decisions of the United States Supreme Court "failed to furnish adequate guidance." 454 U.S. at 1134.

The conflict created in the lower courts over curative legislation is demonstrated by the Ninth Circuit's decision in this case, where it placed its reliance on one decision of this court, and completely ignored other equally valid decisions, perhaps because it

could not distinguish between those decisions.

The conflict is further emphasized by the very nature of the curative legislation at issue here. In this case, Congress attempted to enact a two-paragraph statute that purportedly ratified and affirmed prior unconstitutional actions, without making any changes at all to the underlying substantive legislation. Thus, the original Act, the Reorganization Act of 1977, still contained the originally impermissible one-house legislative veto provision. Although Congress purported to bestow constitutionality on the transfer of authority in this instance by its curative legislation, it did so in a manner that repudiated this Court's repeated declarations that the "legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."

Immigration and Naturalization Service v. Chadha, 103 S. Ct. at 2784.

In Chadha, supra, this Court further noted that "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." 462 U.S. at ___, 103 S. Ct. at 2784. Although Congress might argue for the convenience of enacting such remedial legislation as it proposed here, convenience should not be substituted for substantive constitutional safeguards. In this instance, Congress made a deliberate choice to delegate to the Executive branch of government the authority to reorganize its various departments. To allow Congress to evade the express instructions of this Court in Chadha, by subsequently affirming any actions that are declared by the judiciary to be unconstitutional, would provide the legislative body

with powers far above those envisioned by the Framers of our Constitution. As Mr. Chief Justice Burger noted in the Chadha decision, "there is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President." 462 U.S. at ___, 103 S. Ct. at 2788. See also Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952). To allow the congressional cure to take effect, as the Ninth Circuit has done, hands Congress that very power to avoid cumbersomeness and delays by simple, yet explicit, retroactive cures, permitting it to effectively thumb its nose at constitutional requirements. Thus, the Ninth Circuit committed further error when it allowed Congress to escape constitutional restrictions in its post-haste attempt at

post-hoc repair of constitutional infirmities.

The conclusion of the Ninth Circuit approving the curative legislation should therefore be reviewed by this Court.

## CONCLUSION

For all these reasons, a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

**The EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant, Cross-Appellee,**

**vs.**

**FIRST CITIZENS BANK OF BILLINGS, Defendant-Appellee, Cross-Appellant.**

Nos. 84-3529/3544

Appeal from the United States District Court for the District of Montana

United States Court of Appeals, Ninth Circuit.

Argued and Submitted January 17, 1985

Decided April 16, 1985

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Appeal from the United States District Court for the District of Montana.

Before KILKENNY, GOODWIN, and SKOPIL, Circuit Judges.

SKOPIL, Circuit Judge:

The Equal Employment Opportunity Commission ("EEOC") brought this action

against First Citizens Bank of Billings ("First Citizens") to redress employment discrimination violations. The district court found that First Citizens violated the Equal Pay Act, 29 U.S.C. § 206(d), when it compensated men at higher wages than women working in the same positions. On appeal, the EEOC contests the district court's amended order reducing the original backpay award. First Citizens cross-appeals, challenging (1) the EEOC's jurisdictional authority; (2) the district court's determination that the bank violated the Equal Pay Act; and (3) the award of liquidated damages.

1. EEOC's Enforcement Power.

The Secretary of Labor was originally empowered to bring civil actions on behalf of employees who suffered employment discrimination in contravention of the Equal Pay Act. 29 U.S.C. § 216(c). President Carter, by virtue of authority delegated to him under

the Reorganization Act of 1977, 5 U.S.C. § 901-12, transferred the Secretary of Labor's jurisdiction to the EEOC. Reorganization Plan No. 1 of 1978, 92 Stat. 3781, reprinted in 1978 U.S. Code Cong. & Ad. News 9795-9800.

The Reorganization Act of 1977, however, contained a one-house legislative veto provision, a provision which was later declared unconstitutional. INS v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 2768 (1983). First Citizens claims that any reorganization plan, including the plan which transferred authority to the EEOC, was therefore ineffective. First Citizens argues that only the Department of Labor is vested with authority to enforce Equal Pay Act violations.

This issue was rendered moot when Congress enacted Public Law 98-532, which ratified and affirmed as law each reorganiza-

tion plan, including Plan No. 1 transferring authority to the EEOC. Pub. L. 98-532, 98 Stat. 2705 (1984). The EEOC not only has authority to bring future Equal Pay Act action, but has retroactive authority as well on any previous action it has brought. EEOC v. CBS, 748 F.2d 124, 125 (2d Cir. 1984); Barrett v. Suffolk Transportation Services, 600 F.Supp. 81, ___ (E.D.N.Y. 1984); see also Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 301-02 (1937) (Congress may by enactment ratify acts which it might have authorized).

2. Violations of the Equal Pay Act.

The Equal Pay Act forbids wage discrimination based on sex. 29 U.S.C. §206(d)(1). Once the EEOC offers sufficient evidence showing substantial equality in jobs and a disparity in wages, the burden of persuasion shifts to the employer to show that the disparity is the result of one of the four

statutory exceptions: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any factor other than sex. 29 U.S.C. § 206(d)(1); EEOC v. Maricopa County Community College District, 736 F.2d 510, 513 (9th Cir. 1984).

First Citizens conceded that a wage disparity existed between male and female tellers, proof operators, and installment loan officers. The burden thus shifted to First Citizens. First Citizens relies on the fourth exception, which allows for differentials based on factors other than sex. We review the district court's determination that First Citizens violated the Equal Pay Act under a clearly erroneous standard. Hein v. Oregon College of Education, 718 F.2d 910, 913 (9th Cir. 1983).

A. Tellers

Joe Link was originally hired as a laborer on October 4, 1978 to help move the bank to a new location. Link, who had no previous banking experience or relevant education, began performing teller duties on December 1, 1978 at $650 per month. Evidence disclosed that women in the same job classification as Link with two to five years' experience earned $575 to $580 per month. The most experienced woman, Janet Helphingstine, who had worked nearly eight years, earned $600 per month, $50 less than Link.

First Citizens justifies this salary disparity on the basis that Link was a management trainee. The Equal Pay Act permits discrepancies in pay resulting from the existence of a bona fide training program. 29 C.F.R. §800.148 (1984); Schultz v. First Victoria National Bank, 420 F.2d 648, 653

(5th Cir. 1969). But the program must be more than an afterthought and certain features common to training programs must exist. Elements indicative of a legitimate program include: (1) employees are hired with the knowledge that they are trainees; (2) a training manual exists; (3) rotation follows a schedule instead of depending upon personnel needs; (4) trainees receive formal instruction from the management; (5) the training program is open to both sexes; and (6) advancement to higher positions is constant and frequent. See Hodgson v. Behrens Drug Co., 475 F.2d 1041, 1045 (5th Cir.), cert. denied, 414 U.S. 822 (1973) (the Hodgson court found that, even though the training program contained these elements, the program was in violation of the Act because it was "coterminus with a stereotyped province called "man's work" ").

Joe Link was the first and only employee

in First Citizens' "trainee program." No formal program or manual existed, nor had any management personnel conducted training sessions with Link. Furthermore, there was no vacancy awaiting Link on completion of the program. While Link was frequently rotated between various teller positions, other tellers also held numerous positions. There is little evidence to support First Citizens' claim that Link was a management trainee. The district court correctly ruled that the disparity in wages between Link and the female tellers violated the Equal Pay Act.

B. Proof Operators

First Citizens claims that Ed Nelson received higher pay than the female proof operators because of his greater experience in proof work. Experience is a legitimate factor under the fourth exception. EEOC v. Aetna Insurance Co., 616 F.2d 719, 725 (4th Cir. 1980). Testimony indicated, however,

that experience was not the primary consideration in hiring a proof operator. The main qualities necessary for the job are speed and accuracy. The female operators who were paid less than Ed Nelson were both faster and more accurate than he was. This caused the district court to conclude that experience as a factor in hiring proof operators was not neutrally applied. The district court correctly ruled that Nelson's experience did not exempt First Citizens from paying proof operators equal wages.

C. Installment Loan Officers

Nick Krumenacher was hired in September 1976 as an installment loan lender at the salary of $850 per month. He was promoted to installment loan officer and given a raise to $900 per month in January 1977. This was his salary when he was fired in July 1977. Patricia Eik, after serving three years as an installment loan secretary, was promoted to

installment loan officer in January 1979. Her salary was then $800 per month.

First Citizens claims that there was no salary difference between Krumenacher and Eik. In July 1979, First Citizens gave Eik a retroactive raise that matched Eik's salary to that of Krumenacher's. This occurred after the investigation of First Citizens' salary policy began. Clearly, the retroactive raise cannot conceal the disparity in starting salary between Krumenacher and Eik.

First Citizens alternatively claims that any difference in salary was the result of Krumenacher's education, a factor other than sex. But, Krumenacher's college degree is only marginally related to the job of installment loan officer. As the district court pointed out, "the defendant has failed to offer any evidence to explain why Krumenacher's four years of college education

entitled him to a higher salary as an installment loan officer than Eik who had completed one and one-half years of college, together with three years' experience as secretary of the Installment Loan Department." The district court properly found a violation of the Equal Pay Act with regard to the installment loan officer position.

In each job category First Citizens failed to carry its burden in showing that the wage discrepancies fit within the catchall exception to the Equal Pay Act. The district court was not clearly erroneous in finding a violation of the Equal Pay Act.

3. Backpay Award.

The EEOC argues that the district court erred in amending its backpay award by reducing the recovery from $75,007.34 to $13,118.88. The district court restricted

recovery under section 255(a) of the Equal Pay Act, 29 U.S.C. § 255(a), to a period in which a male was actually hired. The interpretation of the statutory authorization of damages is a question of law that is freely reviewable on appeal. See United States for use of Morgan & Son v. Timberland Paving, 745 F.2d 595, 599 (9th Cir. 1984).

Under the Equal Pay Act, a prevailing employee may recover actual damages if the case is brought within two years of the date the violation took place. 29 U.S.C. § 255(a). If the court determines that the violation was willful, damages may be assessed three years back. Willful means the employer knew, or should have known, that there was an appreciable possibility that the employees involved were covered by the Act. Marshall v. Union Pacific Motor Freight Co., 650 F.2d 1085, 1092 (9th Cir. 1981).

The EEOC filed its complaint against First Citizens on April 2, 1980. The district court, after finding the violation willful, originally computed backpay damages from April 2, 1977. The court subsequently amended its order to limit the actionable wrong to the period after Joe Link began his employment, December 1, 1978. The recovery for the proof operators was similarly limited to the period after Ed Nelson was hired, March 26, 1979. This limitation significantly reduced the amounts of damages to which some employees were entitled. It also eliminated recovery for other employees who had left work before the men were hired, and who had received lower salaries than their male successors.

We conclude that the district court erred. The Equal Pay Act does not require that jobs being compared be performed simultaneously; it also encompasses

situations where an employee of one sex is hired for a particular job to replace an employee of the opposite sex. See Sinclair v. Automobile Club of Oklahoma, Inc., 733 F.2d 726, 729 (10th Cir. 1984); Peltier v. City of Fargo, 533 F.2d 374, 377 (8th Cir. 1976); Pearce v. Wichita County, 590 F.2d 128, 133 (5th Cir. 1979); see also 29 C.F.R. § 800.114(c) (allowing successorship comparisons). Violations may be proved by comparing the woman's salary to that of her male successor. E.g., Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1137 (5th Cir. 1983); Clymore v. Far-Mar-Co., Inc., 709 F.2d 499, 503 (8th Cir. 1983); Di Salvo v. Chamber of Commerce, 416 F.Supp. 844, 853 (W.D. Mo. 1976), aff'd 568 F.2d 593 (8th Cir. 1978). Backpay would be awarded for the period prior to the male's hiring. See Taylor v. Philips Industries, Inc., 593 F.2d 783, 786 (7th Cir. 1979) (in Title VII

action, plaintiff entitled to backpay because her male successors paid more for substantially same work).

In EEOC v. Hay Associates, 545 F.Supp. 1064, 1083 (E.D. Pa 1982), the district court found that the content of the woman's work after February 1, 1977 was substantially the same as the content of a newly hired man who started work on April 1, 1977. The court recognized that the Equal Pay Act applied to such successively held jobs. Id. at 1083, n.21. Similarly, in Di Salvo, 416 F.Supp at 854, the court awarded damages where a woman established that her male successor was paid $3,800 per year more for the same work. The court stated:

> The evidence that plaintiff's male successor, who performed the same duties, was paid a higher salary than plaintiff is sufficient to prove discrimination in compensation because of sex.

Id. at 853. The court ruled that the fact

that the two were not employed at the same time was immaterial because Title VII construed in light of the Equal Pay Act encompasses situations where an employee of one sex is hired for a particular job to replace an employee of the opposite sex. Id. at 852.

The district court here relied on Usery v. Johnson, 436 F.Supp. 35, 44 (D. N.D. 1977), to limit recovery to the time after the men commenced employment. The Usery decision, however, is not binding on us. Additionally, the Eighth Circuit has decided that it is appropriate to use male successors as a basis of comparison in an equal pay action. See Clymore, 709 F.2d at 504; Strecker v. Grand Forks County Social Service Board, 640 F.2d 96, 100 (8th Cir. 1980) (dictum).

The Equal Pay Act is broadly remedial

and should be applied to fulfill the congressional goal of equal pay for equal work. Corning Glass Works v. Brennan, 417 U.S. 188, 208 (1974). It would thwart the purposes of the Act to limit recovery only to the period after the hiring of Link and Nelson. The language of the Act does not support such a limitation. Section 206(d) should apply not only to jobs held concurrently, but also to where an employee is hired to replace an employee of the opposite sex. See 29 C.F.R. 800.114(c). The district court erred in limiting damages to the time after the men were hired.

4. Award of Liquidated Damages.

The district court's decision to award liquidated damages is reviewed for an abuse of discretion. 29 U.S.C. § 260; Donovan v. Crisostomo, 689 F.2d 869, 872 n.5 (9th Cir. 1982). Liquidated damages are compensatory, not punitive in nature. Marshall v. Brunner,

668 F.2d 748, 753 (3d Cir. 1982). They compensate employees for losses they might suffer by reason of not receiving their lawful wages. Id.

The district court awarded liquidated damages in accordance with 29 U.S.C. § 216(b). Section 216(b) reads:

> any employer who violates the provisions of section 206 or section 207 of this Title shall be liable to the employee or employees affected in the amount of their unpaid ... wages ... and an additional equal amount as liquidated damages.

While section 216(b) is mandatory, it is modified by section 260. That section states in pertinent part:

> [I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938 ... the

> court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this Title.

29 U.S.C. § 260. An employer has the burden of showing that the violation of the Equal Pay Act was in good faith and that the employer had reasonable grounds for believing that no violation took place. Sinclair, 733 F.2d at 730. Absent such a showing, liquidated damages are mandatory. Brunner, 668 F.2d at 753.

Good faith is an honest intention to ascertain what the Equal Pay Act requires and to act in accordance with it. Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 464 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978). First Citizens' evidence of good faith is limited to bald assertions that the officers thought that they were in compliance with the Act. The evidence put forward by

First Citizens to show good faith is insufficient to warrant a claim of abuse of discretion.

## CONCLUSION

EEOC had enforcement authority to bring this action. First Citizens' salary policies were properly found to be in violation of the Equal Pay Act. The court erred in limiting damages to the period after the men were hired. Finally, the court's decision to award liquidated damages was not an abuse of discretion. The court's original order of $75,007.34 will be reinstated.

The judgment of the district court is AFFIRMED with the above modification and the case REMANDED to that court for entry of judgment in the stated amount. Citizens shall bear all costs of appeal.

## APPENDIX B

**The EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,**

**vs.**

**FIRST CITIZENS BANK OF BILLINGS, Defendant.**

Nos. 84-3529/3544

United States District Court, D. Montana, Billings Division.

November 10, 1983.

JUDGMENT

BATTIN, Chief District Judge.

Pursuant to the Court's amended findings of fact and conclusions of law filed this day in the above captioned case,

IT IS HEREBY ORDERED that damages be, and the same hereby are, assessed in the total amount of $13,118.88 in accordance with amended finding of fact no. 42 within the memorandum opinion.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this order.

## APPENDIX C

**The EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,**

**vs.**

**FIRST CITIZENS BANK OF BILLINGS, Defendant.**

Nos. 84-3529/3544

United States District Court, D. Montana, Billings Division.

February 14, 1983.

ORDER

BATTIN, Chief District Judge.

This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that damages be, and the same hereby are, assessed in the total amount of Seventy-Five Thousand Seven and 34/100 Dollars ($75,007.34) in accordance with Finding of Fact No. 42 within the Memorandum Opinion.

The EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,

vs.

FIRST CITIZENS BANK OF BILLINGS, Defendant.

Nos. 84-3529/3544

United States District Court, D. Montana, Billings Division.

February 14, 1983.

MEMORANDUM OPINION

The Equal Employment Opportunity Commission (EEOC) has initiated this action pursuant to the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201, 216(c) and 217, to remedy alleged violations of the Equal Pay Act of 1963 (hereinafter referred to as the Act), 29 U.S.C. § 206, which is incorporated into and supplements the Fair Labor Standards Act. Plaintiff alleges that defendant violated §§ 206(d)(1) and 215(a)(2)

of the Act by paying its female employees less than male employees performing equal work under similar working conditions. The Court's jurisdiction is invoked under 28 U.S.C. § 1345.

CONTENTIONS OF THE PARTIES

Specifically, plaintiff alleges the defendant First Citizens Bank of Billings has willfully violated the Equal Pay Act by discriminating against female tellers, proof operators, an installment loan officer and an assistant vice president due to their sex. The EEOC maintains that defendant violated the Act by paying its male employees higher wages than female employees performing equal work within each of these categories.

The defendant has asserted a general denial to these allegations and has asserted various affirmative defenses within each category.

STIPULATIONS OF THE PARTIES

Within Section 2 of the Final Pretrial Order, the parties have stipulated to the following relevant facts:

1. Since April 2, 1977, the defendant Bank has been engaged in commerce within the definition at 29 U.S.C. § 203(b).

2. Since April 2, 1977, the defendant has been an "employer" as defined under the FLSA, 29 U.S.C. §203(d), and has been an "enterprise" as defined in 29 U.S.C. §203(r) and (s).

3. Since 1977, the defendant has realized an annual gross volume of business in excess of $500,000.

4. The persons listed in the Prayer for Relief in the Amended Complaint are or were "employees" of the defendant as defined at 29 U.S.C. §203(e)(1).

This case came on regularly to be heard before the Court sitting without a jury on

June 8 and 9, 1981. Plaintiff EEOC appeared by and through its counsel, Lawrence D. Stone, of Denver, Colorado. Defendant appeared by and through its counsel, Chris J. Nelson, of Billings, Montana. From the testimony presented and evidence introduced by both parties, and the matter having been submitted for decision, the Court now makes the following Findings of Fact and Conclusions of Law.

## FINDINGS OF FACT

### TELLERS--MANAGEMENT TRAINEE PROGRAM

1. Within the Final Pretrial Order the defendant has agreed that its male and female employees performed equal work within the teller, proof operator, and installment loan officer departments. The Bank also admitted that the various male "comparators" were paid more than females in the same job categories.

2. The defendant also concedes that it does not maintain a seniority program, merit

system, or a program which evaluates the quantity or quality of work at the Bank.

3. Within the Teller department, the EEOC contends the defendant violated the Act by paying certain male tellers--Joe Link and Gary Steiner -- a higher salary than other female tellers performing equal duties. The Commission also asserts that Link's trainee status was not legitimate and thus does not constitute an affirmative defense. The defendant argues that Link was paid more than female tellers due to his management trainee status. The plaintiff disputes this fact and maintains that Link was initially designated a teller and subsequently labled a trainee to justify his higher salary.

4. Joe Link was originally hired as a laborer by the Bank in October 1978. Prior to his employment with the defendant, Link had sporadically attended college for two and one-half years, and had held various labor

and store clerk positions of brief durations. Mr. Link had no teller or other banking experience prior to his employment with the Bank. Link assisted in moving the Bank to a new location for approximately two months. Upon completion of the move, Bank officials were impressed with Link's diligence and offered him some type of nonlabor position. Bank records as of late 1978 indicate Link was a "trainee". Although Link was eventually characterized as a management trainee, testimony at trial indicated he began employment as a teller.

5. Don Hanson, Vice President and supervisor of Tellers and Proof Operators, testified that the training program in question has only been offered to one male employee -- Joe Link, was never reduced to writing, and is presently non-existent. Georgia Hansen, a former teller employed by defendant, testified that she applied for an

executive trainee position in November 1978, but was hired as a teller. Hansen also indicated that she submitted several requests for advancement which were denied. During trial, the Court heard conflicting testimony concerning Mr. Link's actual knowledge of his trainee status. Mr. Link testified that he did not become aware of his trainee status until some time after he accepted new employment as a teller. Tr., pp. 94-100. Other conflicting testimony from Mr. Jim Bennett, President of the Bank and Chairman of the Board, indicated he told Link to " . . . wear a tie . . . and learn about banking." Similarly, Gail Earhardt also testified that she was informed of Link's management trainee status prior to his work as a teller.

6. Had Mr. Link remained employed, the Bank argues that his training program would have consisted of rotation through the various teller positions and training in the

Proof, Bookkeeping and Loan Departments. The Bank additionally thought Link could possibly become an officer of some type in the future. However, testimony at trial revealed that the Bank had no official nor informal training program and no written training manual was compiled for employees. Joe Link was not employed nor trained under any specific guidelines or schedules. Further, Link did not receive any formal management training from individual officers within the Bank.

7. Gail Earhardt, Head Teller for the Bank during Joe Link's employment, testified that several other female tellers rotated among the various teller stations in addition to Link. The Court's Exhibit 1, a copy of Interrogatory No. 10 from plaintiff's third set propounded to defendant also reflects the extent of rotation among the various tellers. Although each type of teller position has separate and distinct duties, the Bank con-

cedes that all tellers perform work which requires equal skill, effort and responsibility.

8. Testimony by Mara Dale Gryder, a teller during this period, revealed she had been told that Link

> . . . was put in as a teller, and until they found that they needed to put him someplace else, he was going to have to stay on the teller line whether he like that or not.
>
> Tr. p. 264.

9. The parties disagree over the weight attributable to certain teller seminars attended by Link in comparison with certain American Institute of Banking courses attended by other, female tellers. Defendant has objected to the admissibility of the (A.I.B.) courses, arguing that they are substantially less rigorous than the seminar attended by Joe Link. Tr. p. 270. The Court finds little if any distinction between these seminars and the defendant's objection is

essentially one of weight rather than of admissibility. Therefore, the Court believes the A.I.B. courses are admissible to show training received by female tellers. In any event, this evidence, without more, does not substantiate the claim that Link received more training than the other, female tellers.

10. Further testimony indicated that Sue Bond, Terri Riemann, and Link were often utilized in varying degrees as relief tellers among the various departments -- e.g., to alleviate shortages due to the Bank's grand opening of its new facility and substitution for vacationing or ill tellers.

11. When viewed in its entirety, the Court finds that the evidence and testimony substantiates plaintiff's assertion that Joe Link's rotation was primarily dependent upon staffing shortages rather than a planned, predictable training program. Thus, his position was substantially similar in skill,

effort and responsibility in comparison to other, female tellers employed by defendant. The Court also finds that the vague, ill-defined training program contained no specialized instruction or supervision other than routine rotation and acquisition of skills, nor was there a predetermined goal such as eventual promotion to an executive position.

12. The defendant has failed to prove its affirmative defense by a preponderance of the evidence, i.e., that the wage discrepancy between Link and other, female tellers was a justifiable differential based upon a legitimate training program. Moreover, the training program was never offered to any female employees on an equal basis, even upon specific application for similar training, e.g., the application of Georgia Hansen for executive training. Here, Link's training experience was significantly similar to most

other, female tellers in the Bank.

13. Whether Link was in fact a designated trainee is of little consequence. The substantive provisions of a training program must be examined and compared to a trainee's actual duties. If, as we find here, the program is not meaningfully independent of the trainee's usual activities, it cannot constitute a valid defense to the Equal Pay Act.

14. Accordingly, Joe Link's $650 per month salary established the minimum level or base rate of pay at which all tellers, regardless of sex, should have been compensated. See Plaintiff's Exhibits Nos. 2 and 3. Since the Court finds a violation of the Act has been established with regard to the training program, we see no need to pursue the cumulative effect of evidence concerning the other male teller, Gary Steiner.

PART-TIME TELLERS

15. The defendant has mentioned the alleged differences between part-time and full-time tellers, presumably in relation to any damage the Court might award if liability is resolved against the Bank. The defendant's answer has not interposed this affirmative defense nor has the defendant pursued this issue in its trial and post-trial memoranda or in its proposed Findings of Fact and Conclusions of Law. The defendant has simply failed to present any evidence in order to meet its burden on this issue. Thus, it appears defendant has abandoned this particular defense and the Court believes it is no longer an issue in this case.

PROOF OPERATORS

16. As with the teller category, the defendant has admitted in the Final Pretrial Order that Ed Nelson, a male proof operator for the Bank, received a higher salary than

female proof operators performing equal work. Therefore, the burden shifts to the defendant to justify the disparate wages. The Bank asserts the affirmative defense that Nelson was paid more due to his prior experience -- i.e, on a basis other than sex.

17. Testimony at trial indicated that the Bank's Proof Department sorts, classifies and reaffirms most of the daily bank transactions such as deposits, withdrawals and other fund transfers. A proof operator uses a basic adding machine with one hand and feeds documents into a proof machine with the other hand. This machine physically sorts and magnetically encodes each document.

18. In early 1979, Don Hanson, Vice President in charge of the Proof Department, was disappointed with the Department's quality of performance. Since a proof department is under rather strict daily time limitations concerning transmittals to the

local clearinghouse, speed, accuracy and prior experience are critical factors in hiring a proof operator. Although citing experience as a third consideration, Hanson conceded that speed and accuracy were the most important factors in maintaining an efficient Proof Department. Tr. pp. 19-20.

19. Ed Nelson, a former proof operator for defendant, was hired by Hanson in March 1979. There was substantial evidence that Nelson, as male comparator within the Proof Department, had more experience than Carolene Emter and Donna Nutt, but did not perform adequately and was often behind schedule in his work. Additional testimony revealed that other employees were temporarily transferred to assist in bringing the Proof Department's work back on schedule. See, e.g., Testimony of Carolene Emter, Tr. pp. 116-126. It was generally conceded that Nelson ultimately was considered a mediocre if not below average

Proof Operator and would have been terminated had he not resigned.

20. Although Carolene Emter, Donna Nutt, Debbie Miller, Robyn Larson, and Linda Mathiason had less experience as proof operators, they were significantly faster and at least equal in accuracy in relation to Nelson.

21. At trial, the defendant objected to the speed and accuracy comparisons, arguing that they were irrelevant in evaluating its reasons for paying higher wages based on experience. However, the three factors cited above must be analyzed in relation to each other so that we may ascertain if these factors were uniformly applied to male and female employees.

22. However, in this case, experience as a factor in hiring proof operators was not neutrally applied. There is no indication that the experience of the various female

proof operators was considered in establishing their salaries. The defendant has wholly failed to elaborate why the experience of Nelson justified a higher salary than admittedly more competent though less "experienced" female proof operators. Defining experience by simple mathematical calculations and assessing salary based on number of years experience cannot, without further explanation, serve as an acceptable business justification for higher salary. The defendant has simply failed to meet its burden of proof in establishing experience as a "catchall" exception in this case. Thus, we find insufficient evidence exists on the record to support experience as a legitimate reason for disparate wages in the Proof Department.

INSTALLMENT LOAN OFFICERS

23. As with the two previous categories, the Final Pretrial Order reflects that

plaintiff has stated a prima facie case with installment loan officers. The basic issue here is whether a superior education is a legitimate factor other than sex which justifies a wage differential between defendants male and female installment loan officers performing equal work.

24. Unfortunately, neither party expended much effort regarding this category. However, once again, defendant bears the burden of proving its affirmative defense, in this category, education.

25. Nick Krumenacher, a former Bank employee is the male comparator in this level. In September 1976, defendant hired Krumenacher as an installment loan lender with a salary of $850 per month. In January 1977, Krumenacher was promoted to Installment Loan Officer and received a salary of $900 per month until his termination in early July 1977. It should also be noted that

Krumenacher possessed no prior banking or lending experience when hired by defendant.

26. Patricia Eik was employed at the Bank as an installment loan secretary for three years prior to her promotion to Installment Loan Officer on January 1, 1979. Eik became an installment loan officer one and one-half years after Krumenacher's departure from the Bank. Eik was initially paid $800 per month as Installment Loan Officer and received a $50 per month merit raise in July 1979. This raise was retroactive to January 1979 or the beginning date of her tenure as Installment Loan Officer.

27. The parties have agreed that both Krumenacher and Eik performed equal work; however, the defendant argues Krumenacher's employment is too remote in time and cannot be used as a valid comparison. Defendant also maintains that Krumenacher was paid a higher salary due to his greater education.

Defendant further argues that the disparity in wages results from its raise policy which provides that officers receive salary increases only at the beginning of each calendar year. Thus, defendant alleges that the timing of Eik's promotion in mid-year also caused the discrepancy.

28. The regulations promulgated under the Equal Pay Act authorize the comparison of successive as well as contemporaneous employees. We find ample authority exists to use Krumenacher as a reference in this case. Since it has failed to prove or argue why the comparison is invalid, the remoteness argument advanced by defendant is largely unsubstantiated.

29. Merely stating education as a factor other than sex does not satisfy the burden of elaborating why that affirmative defense should be accepted. The defendant's subjective determination that education justifies

the difference in pay between Eik and Krumenacher is not, alone, sufficient to rebut plaintiff's prima facie case. Surely education is a factor in almost every situation involving wages. However, defendant has failed to offer evidence that the slightly broader education of Krumenacher was important in relation to the performance of an installment loan officer. Even if the Court accepts the mid-year raise given to Eik as a first of the year raise in accordance with the Bank's policy, the remaining wage discrepancy has not been adequately addressed. Once again, defendant has chosen to inequitably apply a factor other than sex to justify the wage disparity between these two individuals.

30. Ray Lampi, defendant's Vice President in charge of the Installment Loan Department, admitted that since Eik was an existing employee at the time of her promo-

tion to Installment Loan Officer, her college education was not considered. Tr. pp. 144-150. In this category Eik possessed much more relevant -- i.e., lending experience -- than Krumenacher. Although Krumenacher's education was only viscerally considered when he was hired, see Tr. pp. 146-149, it is now asserted as the major reason for his higher salary. However, the defendant has failed to offer any evidence to explain why Krumenacher's four years of college entitled him to a higher salary as an installment loan officer than Eik who had completed one and one-half years' college education together with three years' experience as secretary of the Installment Loan Department. A relevant, equitable relationship between education and the Installment Loan Officer position has not been presented. The $900 per month paid to Krumenacher established the base rate which any other female Installment Loan Officer

should have received.

31. In addition to this amount, the plaintiff has requested the Court to consider the rate of inflation from 1978 through 1980 and thereby increase Eik's total award to $4,437.08 plus, presumably, an equal amount of liquidated damages. See Plaintiff's Exhibit No. 11. Plaintiff believes that utilizing the Bureau of Labor Statistics Consumer Price Index for these years would eliminate much of the speculation normally associated with computing inflation as a portion of damages. Although such a retrospective analysis might be less speculative, there has been no evidence presented that Krumenacher nor any other Bank employee received "inflation" salary increases in addition to their regular pay raises during this period. It may very well be that all wage increases were based in part on increases in the cost of living. However,

without any evidence that all other employees' salaries were computed in the manner now suggested, we decline to accept plaintiff's alternative damage compilation in this category. Further, the authorities cited by plaintiff for inflation damages are largely unpersuasive since none involve the Equal Pay Act.

ASSISTANT VICE-PRESIDENTS

The EEOC has suggested that the Bank violated the Act in a fourth category -- Assistant Vice-Presidents. It is argued that the male comparator, Craig Swenson, was paid a higher salary than Evelyn Sandmeyer, although both were allegedly performing equal work. The defendant has disputed the assertion that these two Assistant Vice-Presidents were performing equal work, therefore the plaintiff bears the initial burden of proving a prima facie case of sex-based wage discrimination.

32. Craig Swenson and Evelyn Sandmeyer simultaneously became Assistant Vice-Presidents with the Bank in 1973. Sandmeyer terminated her employment with the Bank in December 1978. Swenson is currently a Vice President in charge of the Commercial Loan Department.

33. Testimony by Swenson indicated that he and Sandmeyer did have some common duties as Assistant Vice-Presidents, such as check approvals, early and late officer duty, and attendance at officer meetings. However, the preponderance of the evidence and testimony from several bank employees revealed that Swenson and Sandmeyer did not perform equal work requiring equal skill, effort and responsibility. See Testimony of Craig Swenson, Tr. pp. 163-169; Robert Spannagel, Vice President, Tr. pp. 175-180; James Bennett, President and Chief Executive Officer, Tr. pp. 190-195.

34. This testimony indicated Swenson's primary duties were processing and seeking approval of commercial loan applications. This job involved investigation of an applicant's credit history, employment, sufficiency of collateral and general financial stability. Upon examination of this information, Swenson then formulated a credit decision -- i.e., whether the loan was a good risk. Swenson also handled lines of credit which involved approving cash advances to an individual or business over a predetermined period of time. These duties comprised approximately 80% to 90% of Swenson's work with the Bank. Tr. p. 166.

35. In contrast, Sandmeyer performed several Bank functions substantially unrelated to actual credit decision-making, such as securing government-guaranteed student loans which did not require extensive credit investigation or collateral. Sandmeyer also

supervised the Teller and Escrow Departments, Certificates of Deposits, Deferred Annuities, Individual Retirement Accounts, Mastercharge and Visa matters and most promotional programs offered by the Bank. Swenson was not involved in any of these activities.

36. Sandmeyer also participated extensively in civic and public relations activities for the Bank, such as membership in the Blue Blazers, a branch of the Billings Chamber of Commerce. She also was the Bank's representative in the American Institute of Banking and was the first woman president of the Yellowstone Chapter of that organization.

37. Sandmeyer admitted that she did not have similar duties and responsibilities in comparison with Craig Swenson. Tr. pp. 139-143. Although there was some testimony that Sandmeyer's extensive banking experience and personal relations service was ignored by the Bank, the record does not support the

plaintiff's contentions of unequal pay for equal work in this category. In light of the relevant testimony, it is clear that Sandmeyer believed that some of the Bank's officers did not fully appreciate her efforts in behalf of the Bank. However, these problems cannot compensate for the lack of equality and responsibility between Swenson and Sandmeyer. This is not a "comparable worth" case. See Conclusions of Law No. 1, infra.

38. The Court believes this category is the converse of the Teller-Management Trainee issue discussed earlier. Here, the classification of Assistant Vice-President rendered the jobs facially equivalent; but the actual substance of the two positions were clearly and admittedly unequal. Thus, we find there was no violation of the Act by the defendant within the Assistant Vice-President level.

## DAMAGES

### A. Willfulness

39. The plaintiff has contended that the defendant willfully or knowingly violated the applicable provisions of the Equal Pay Act, thereby justifying the application of the three-year statute of limitations provided within the Fair Labor Standards Act. Defendant asserts that if the Court finds a violation of the Act, the Bank's conduct was nevertheless reasonably justified -- i.e., the defendant possessed a good-faith belief that its wage differentials were based on recognized exceptions to the Act.

40. Although its officers admitted their awareness of the Equal Pay Act, it is clear that the Bank did not expend much, if any, effort to determine its statutory responsibilities. Therefore the Court believes the defendant committed willful violations of the Act in accordance with the Ninth Circuit's

definition and application of that term. See Conclusions of Law 18 and 19, infra. Accordingly, the three-year statute of limitations applies to this case as established at 29 U.S.C. § 255(a) and damages shall be computed from April 2, 1977, three years prior to commencement of this action.

B. Liquidated Damages

41. Plaintiff has also requested an award of liquidated damages as authorized by the Act at 29 U.S.C. §§ 216(b), (c) and 260. The burden of proof rests upon the defendant to satisfy the Court that it proceeded with its wage policies in good faith and based these policies on reasonable positions. Here, defendant has merely asserted its good faith without offering any substantiating testimony or evidence. Defendant has simply failed to meet its burden on this issue. The only testimony of defendant's officers con-

cerning good faith revealed that the Bank possessed, at best, only a vague awareness of the Equal Pay Act. See Tr. pp. 30-31, 51, 59. To prove good faith and thereby escape the assessment of liquidated damages requires more than a cursory concern for the applicable statutes. An award of liquidated damages is therefore appropriate in this case.

42. In accordance with the discussion above, the following damages are assessed:

TELLERS

| Tellers | 3 Years Prior to Date Civil Action Commenced | Equal Amount As Liquidated Damages |
|---|---|---|
| 1. Connie Pingree (Oakland) | 95.11 | 95.11 |
| 2. Ilene Marie Neudick | 893.64 | 893.64 |
| 3. Glenda C. Kaufman (Chapman) | 659.74 | 659.74 |
| 4. Irene Ybarra Gonzales | 1919.94 | 1919.94 |
| 5. Nancy Bennett | 1398.16 | 1398.16 |
| 6. Brenda Glle Mulvaney | 1126.80 | 1126.80 |
| 7. Patricia Marie Speece | 968.57 | 968.57 |
| 8. Judy Miller | 253.54 | 253.54 |
| 9. Susan Pehler | 614.11 | 614.11 |

| | Tellers | 3 Years Prior to Date Civil Action Commenced | Equal Amount As Liquidated Damages |
|---|---|---|---|
| 10. | Bonita Jo Frank | 193.10 | 193.10 |
| 11. | Connie Nunley | 2070.27 | 2070.27 |
| 12. | Debbie Wood | 234.42 | 234.42 |
| 13. | Linda Mathiason | 339.31 | 339.31 |
| 14. | Gloria Morrison | 1671.62 | 1671.62 |
| 15. | Terri Marie Riemann | 1063.04 | 1063.04 |
| 16. | Julie Mathiason | 66.08 | 66.08 |
| 17. | Susan M. Decker | 504.26 | 504.26 |
| 18. | Gail Erhardt (Knox) | 2831.46 | 2831.46 |
| 19. | Lorna R. Boyd (LeMay) | 1916.58 | 1916.58 |
| 20. | Elizabeth J. Davis | 2376.79 | 2376.79 |
| 21. | Mara Dale Gryder (Krueger) | 1467.55 | 1467.55 |
| 22. | Rebecca Payne | 251.27 | 251.27 |
| 23. | Denise King | 109.57 | 109.57 |
| 24. | Nancy Conn | 56.72 | 56.72 |
| 25. | Pam Bales | 1212.60 | 1212.60 |
| 26. | Victoria J. Dedmore | 95.62 | 95.62 |
| 27. | Vicki Kemph | 1106.94 | 1106.94 |
| 29. | Janet Lynn Taylor | 348.85 | 348.85 |
| 29. | Bobbie Louise Tyler | 916.38 | 916.38 |
| 30. | Susan E. Bond | 315.20 | 315.20 |
| 31. | Georgia Lee Hansen | 665.73 | 665.73 |
| 32. | Loralee Sue Crow (Shetler) | 425.51 | 425.51 |
| 33. | Janet Helphingstine | 168.07 | 168.07 |
| 34. | Nancy Herden | 78.07 | 78.07 |
| 35. | Judy Smith | 156.68 | 156.68 |
| 36. | Tamera R. Lueck | 431.34 | 431.34 |
| 37. | Vickie Dawn Horr | 157.34 | 157.34 |
| 38. | Colleen Perkins | 145.91 | 145.91 |
| 39. | Charlene Orelup | 143.11 | 143.11 |
| 40. | Sabra Mack | 102.83 | 102.83 |
| 41. | Brenda Schroeder | 164.29 | 164.29 |
| 42. | Debbie Miller | 2005.57 | 2005.57 |
| | Total | $31,721.79 | $31,721.79 |

PROOF OPERATORS'
BACK WAGE ENTITLEMENT

| Proof Operators | 3 Years Prior to Date Civil Action Commenced | Equal Amount As Liquidated Damages |
|---|---|---|
| 1. Cindy Beals (Cooper) | $1691.29 | $1691.29 |
| 2. Debbie Miller | 318.37 | 318.37 |
| 3. Keniece Kay Jones | 176.94 | 176.94 |
| 4. Carolene Emter | 1795.60 | 1795.60 |
| 5. Denise Reno (Imlay) | 855.30 | 855.30 |
| 6. Donna Nutt | 43.94 | 43.94 |
| 7. Rhonda Schuler | 25.39 | 25.39 |
| 8. Robyn Kay Larson | 175.11 | 175.11 |
| 9. Linda Mathiason | 99.94 | 99.94 |
| Total | $5181.88 | $5181.88 |

INSTALLMENT LOAN OFFICER

| Installment Loan Officer | Back Wages | Equal Amount as Liquidated Damages |
|---|---|---|
| Patricia Eik | $600.00 | $600.00 |

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. Each of the above-stated Findings of Fact is hereby adopted and restated as a Conclusion of Law.

2. It should be noted that this is not a so-called "comparable worth" type case where individuals seek increased compensation from a comparison of their positions with other diverse jobs. See County of Washington v. Gunther, 452 U.S. 161, 166 n. 6 (1981).

3. The Equal Pay Act prohibits an employer from discriminating against its employees on the basis of sex by paying higher wages to employees of one sex than the other for "equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions. . . ." 29 U.S.C. § 206(d)(1).

4. In every Equal Pay Act case, the burden initially rests on the plaintiff to prove that the employer pays different wages to employees of opposite sexes for "equal work" as defined in the statute. Corning Glassworks v. Brennan, 417 U.S. 188 (1974).

Once a plaintiff has presented a prima facie case, the burden shifts to the employer to justify the discrepancy under one of the Acts' four exceptions. These four exceptions to the basic rule are considered affirmative defenses that an employer must plead and prove in order to avoid application of the Act. Id. at 196. These affirmative defenses include: (a) a seniority system, (b) a merit system, (c) a system which measures earnings by quantity or quality of production, or (d) a wage differential based on any other factor other than sex. 29 U.S.C. § 206(d)(1).

5. Here, the parties have agreed that a prima facie case exists concerning the Teller, Proof Operator and Installment Loan Officer Departments. In these categories, defendant premises its defense on the fourth, or so-called "catch-all", exception -- that the wage differences are based on a factor other than sex.

A. Tellers and the Training Program

6. The defendant has failed to prove the existence and availability of a legitimate training program which could justify a higher wage to Joe Link, the Bank's designated management trainee. The controlling factor in this category is work performance and content, not its classification or description. See, e.g., 29 C.F.R. § 800.121 (1981). Although the Department of Labor's interpretive bulletin on training programs allows disparate wages to trainees in bonafide training programs, such programs are carefully scrutinized where, as here, " . . . they appear to be available only to employees of one sex . . . ." 29 C.F.R. § 800.148 (1981).

7. Moreover, the Bank's defense that its program here was experiencing initial difficulties due to its infancy is not persuasive. An acceptable training program must

entail more than an honest effort; it should have "substance and significance independent of the trainee's regular job." Hodgson v. Behrens Drug Co., 475 F.2d 1041, 1047-48 (5th Cir. 1973), cert. denied, 414 U.S. 822 (1973).

8. Further, the Bank's vague assertion that Joe Link might eventually become an officer of some type also fails to support the existence of a training program. Mere recognition of an employee's ability to work his way up the Bank's job levels is irrelevant. See, e.g., Marshall v. Security Bank & Trust Co., 572 F.2d 276, 279 (10th Cir. 1978). Such an approach is a logical application of the Interpretive Bulletin on training programs:

> In this sense every job in every type of business would be training and nothing would be left for the operation of the Interpretive Bulletin training program.

Schultz v. First Victoria National Bank, 420 F.2d 648, 656 (5th Cir. 1969).

9. In summary, the defendant's training program contained few, if any, of the characteristics normally associated with a legitimate training effort -- i.e., no written instructions, the program is currently nonexistent, no evidence of equal availability to males and females, no individual oversight by Bank officers. See, Usery v. Johnson, 436 F.Supp. 35, 42 (D. N.D. 1977). We believe there was no practical distinction between Link's rotation and the duties of all other tellers. The program in this case was, in actuality, nothing more than an unstructured acquisition of skills by performance of regular teller duties. See, e.g., Schultz v. First Victoria National Bank, supra, 420 F.2d at 656.

B. Proof Operators

10. The Court has previously determined

in its Findings of Fact that the defendant failed to prove Ed Nelson's prior experience was an exception to the Act. Defendant's burden of proving this affirmative defense requires more than esoterically asserting experience as a basis for unequal wages. The Bank must further show the frequency and manner in which Nelson's additional experience affected his performance, thereby justifying a greater salary. See, e.g., Peltier v. City of Fargo, 533 F.2d 374, 377 (8th Cir. 1976), citing Schultz v. Wheaton Glass Co., 421 F.2d 259, 263-264 (3rd Cit. 1970), cert. denied, 398 U.S. 905 (1970). Absent an acceptable business reason, an employer cannot use criteria which cause wage disparity between males and females. Kouba v. Allstate Insurance Co., 691 F.2d 873, 876 (9th Cir. 1982). However, a factor used to further a business policy cannot be stricken as a discriminatory merely because it results

in wage differentials. Id.

11. The Ninth Circuit has determined that an employer must reasonably apply all factors in light of its stated purpose and general practices. Id. Of course, we are not dictating which factors the Bank should or should not use in establishing Proof Operator salaries. That function is clearly left to an employer's discretion. However, factors which the Bank has deemed relevant must be applied indiscriminately and uniformly. Simply stating that one employee who has five years experience should be paid more than an admittedly more efficient employee with two years experience is not, without elaboration, an honest, equitable and neutral application of that characteristic. See Brennan v. Sears, Roebuck & Company, 410 F.Supp. 84, 93-94 n. 2(N.D. Iowa 1976). In essence, defendant has not explained why Nelson was apparently considered a more

valuable employee due to his experience.

C. Installment Loan Officers

12. Defendant has relied upon Nick Krumenacher's greater education as a factor other than sex justifying his higher salary. Using Krumenacher as a comparator is entirely appropriate in this case. Employees whose salaries are compared may hold jobs in succession as well as simultaneously. Pearce v. Wichita County, City of Wichita Falls, Texas Hospital Board, 590 F.2d 128, 133 (5th Cir. 1979), citing Hodgson v. Behrens Drug Co., supra, 475 F.2d at 1049.

13. Both Eik and Krumenacher had obtained education which was unrelated to banking. The Bank has not proved that any college education is a prerequisite for an Installment Loan Officer position. Bullock v. Pizza Hut, Inc., 429 F.Supp. 424, 430 (M.D. La. 1977). The Bank's subjective determination that Krumenacher's education

was more beneficial than Eik's education in relation to the Installment Loan Officer position is not enough. Brennan v. Victoria Bank & Trust Co., 493 F.2d 896, 902 (5th Cir. 1974). Additionally, the Bank has not explained why Krumenacher's education made him an apparently more valuable Installment Loan Officer than his successor, Eik. See Bullock v. Pizza Hut, Inc., supra, 429 F.Supp. at 430.

14. The Bank admitted through testimony of Ray Lampi that it did not even consider Eik's education in relation to her promotion and new salary. Similar to our Finding in the Proof Department, this salary factor was selectively and disproportionately considered. There was no neutral, unbiased application of education as a factor affecting wages in this case. Brennan v. Sears, Roebuck & Co., supra, 410 F.Supp. at 93-94.

Therefore, Eik should receive the same salary as her predecessor who admittedly performed identical work. Spray v. Kellos-Sims Crane Rental, Inc., 507 F.Supp. 745, 751 (S.D. Ga. 1981).

C. Assistant Vice Presidents

15. Since the parties have disagreed on whether a prima facie case has been stated in this category, the burden rests on the plaintiff to prove two essential elements: (a) that the wages paid to males and females by an employer are unequal and (b) that the jobs performed require equal work -- duties requiring equal skill, effort and responsibility. Corning Glassworks v. Brennan, supra, 417 U.S. at 195. "Equal work" has been defined as "substantially" equal, not identical. Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982); Shultz v. Wheaton Glass Co., 421 F.2d 259 (3rd Cir. 1970), cert. denied, 398 U.S. 905 (1970). See also, 29

C.F.R. §§ 800.118-800.132 (1981).

16. Job titles or job classifications are only the starting point in determining equal work. The Court must also examine the actual content and demands dictated by a particular position. See, e.g., Gunther v. County of Washington, 623 F.2d 1303, 1309 (9th Cir. 1979), cert. granted, 449 U.S. 950 (1980), affirmed, 452 U.S. 161 (1981); Orahood v. Board of Trustees of University of Arkansas, 645 F.2d 651, 654 (8th Cir. 1981).

17. Here, the Assistant Vice President duties shared by Swenson and Sandmeyer were few and largely generic in that most other Bank officers had similar responsibilities -- e.g. early and late duty, check approvals. By her own admissions at trial, Sandmeyer did not perform substantially equal work in relation to Swenson. See Finding of Fact No. 41, supra. Thus, no further analysis is necessary. Plaintiff simply failed to prove

a prima facie case in the Assistant Vice President area. The testimony presented at trial clearly indicates Craig Swenson and Evelyn Sandmeyer did not perform equal work.

## DAMAGES

### A. Willfulness

18. The Ninth Circuit has adopted the "knew or should have known" standard implemented by other Circuits in determining willfulness under 29 U.S.C. § 255:

> A violation is willful when the employer was, or should have been, cognizant of an appreciable possibility that the employees involved were covered by the statutory provisons.

Marshall v. Union Pacific Motor Freight Co., 650 F.2d 1085, 1091-92 (9th Cir. 1981). The willfulness here is not to be confused with nor compared to punitive damages in general civil litigation. The plaintiff need not uncover some bad motive or purpose in order

to prove willfulness. Nitterright v. Claytor, 454 F.Supp. 130, 139 (D.C. 1978).

19. Although it asserts good faith as a defense to the charge of willfulness, it is clear that the Bank did little more than tacitly recognize that its wage policies probably fell within the Act's coverage. Willfulness is presumed absent clear proof of good faith. Reeves v. International Telephone & Telegraph Corp., 616 F.2d 1342, 1352-53 (5th Cir. 1980), cert. denied, 449 U.S. 1077 (1981). There was no active attempt by the Bank to explore its statutory obligations, thus

> [a]n ostrich-like cultivation of ignorance has never been considered a defense to liability for willful violation of the Act.

Brennan v. Heard, 491 F.2d 1, 3 (5th Cir. 1974). Moreover, good faith is irrelevant in determining an employer's willfulness under the Act. Marshall v. A & M Consolidated

Independent School District, 605 F.2d 186, 190 (5th Cir. 1979); Bailey v. Pilots Assn. for the Bay and River Delaware, 406 F.Supp. 1302, 1308 (E.D. Pa. 1976).

B. Liquidated Damages

20. The Act provides for an equal amount of liquidated damages in addition to recovery of past due wages. See 29 U.S.C. § 216(b). Liquidated damages are not some form of punitive action, but are designed to compensate an employee for delay in the payment of the full wage at the time it was due. Marshall v. Brunner, 668 F.2d 748, 753 (3rd Cir. 1982). A finding of willfulness does not automatically warrant or compel an award of liquidated damages. Hill v. J.C. Penney Co., Inc., 688 F.2d 370, 375 n. 3 (5th Cir. 1982). To prevent assessment of liquidated damages, an employer must prove that noncompliance with the Act was in good faith and that its violation was premised on such reasonable

grounds that justice would not demand more than a compensatory award. Rothman v. Publicker Industries, 201 F.2d 618, 620 (3rd Cir. 1953). This liquidated damage provision was amended by the Portal-to-Portal Pay Act of 1947, 29 U.S.C. § 260, which gave the courts discretion in determining the amount, if any, of liquidated damages where an employer shows good faith conduct. Therefor, good faith is pertinent in invoking the Court's discretion to avoid liquidated damages. A finding of "good faith" has been interpreted to require an honest intention to ascertain what the Act requires and then appropriate compliance. Nitterright v. Claytor, supra, 454 F.Supp. at 140-141, citing Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 464 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978).

In accordance with our Findings of Fact, we believe the Bank's conduct did not come

within this definition. Due to the defendant's failure to meet its burden of proving good faith and reasonableness, the Court does not have the discretion to minimize the defendant's liability for liquidated damages under §§ 216(b) and 260. Marshall v. Brunner, supra, 668 F.2d at 753 (citations omitted). The evidence here supports the conclusion that liquidated damages are justified. Since the maximum amount of liquidated damages has been awarded, pre-judgment interest is not recoverable. See, e.g., Hodgson v. Miller Brewing Co., 457 F.2d 221, 229 (7th Cir. 1972), citing Brooklyn Bank v. O'Neil, 324 U.S. 697 (1945).

An appropriate order shall issue in accordance with these Findings of Fact and Conclusions of Law.

No. 85-122 (2)

Supreme Court, U.S.
FILED
SEP 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1985

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FIRST CITIZENS BANK OF BILLINGS, PETITIONER

*v.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTION PRESENTED

Whether congressional ratification of the Equal Employment Opportunity Commission's power to enforce the Equal Pay Act, 29 U.S.C. 206(d), resolves petitioner's challenge to the Commission's enforcement authority.

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 758 F.2d 397. The memorandum opinion of the district court (Pet. App. 23-71) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on April 16, 1985. The petition for a writ of certiorari was filed on July 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

In 1978, President Carter approved Reorganization Plan No. 1, 43 Fed. Reg. 19807, which transferred administration and enforcement of the Equal Pay Act (EPA), 29 U.S.C. 206(d), from the Department of Labor to the Equal Employment Opportunity Commission (EEOC). See 92 Stat. 3781 *et seq.* The President took this action pursuant

to the Reorganization Act of 1977, 5 U.S.C. 901 *et seq.*, which contained a one-house legislative veto provision. See 5 U.S.C. 906.

In 1980, the EEOC filed this action against petitioner First Citizens Bank of Billings. The EEOC charged that petitioner had violated the EPA by paying men higher wages than women working in the same positions. In 1983, the district court ruled that petitioner had willfully violated the EPA with respect to the compensation of female tellers, proof operators, and installment loan officers (Pet. App. 22-71). The court awarded $75,007.34 in damages (*id.* at 22) but later reduced the award to $13,188.88 (*id.* at 21). The EEOC appealed from the reduction of damages.

Shortly after the district court's original decision, this Court decided *INS* v. *Chadha,* 462 U.S. 919 (1983), holding unconstitutional the legislative veto provisions contained in Section 244(c)(1) of the Immigration and Nationality Act, 8 U.S.C. 1254(c)(1). Petitioner, relying on *Chadha,* argued through cross-appeal that the legislative veto provision of the Reorganization Act of 1977 was likewise unconstitutional, that reorganization plans taken pursuant to the Act were therefore invalid, and that the EEOC accordingly lacked authority to enforce the EPA. While petitioner's cross-appeal was pending, Congress enacted Public Law 98-532 (98 Stat. 2705) which ratified each reorganization plan implemented pursuant to the Reorganization Act of 1977.[1] The Ninth Circuit concluded that the curative statute

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[1]Public Law 98-532 (98 Stat. 2705) provides:

> Section 1. The Congress hereby ratifies and affirms as law each reorganization plan that has, prior to the date of enactment of this Act, been implemented pursuant to the provisions of chapter 9 of title 5, United States Code, or any predecessor Federal reorganization statute.
>
> Sec. 2. Any actions taken prior to the date of enactment of this Act pursuant to a reorganization plan that is ratified and affirmed

had rendered petitioner's claim moot, stating that "[t]he EEOC not only has authority to bring future [EPA] action, but has retroactive authority as well on any previous action it has brought" (Pet. App. 4). Petitioner seeks review of that ruling in this Court.[2]

## ARGUMENT

The court of appeals correctly concluded that Public Law 98-532 resolved any doubts concerning the EEOC's authority to enforce the EPA. Its holding is consistent with the decisions of this Court and the decisions of other courts of appeals that have considered the issue. The court of appeals' ruling is applicable to only a limited number of suits that were brought prior to the enactment of Public Law 98-532 and, thus, does not present an issue of continuing importance that warrants this Court's review.

1. From 1978 to 1983, the EEOC exercised unchallenged authority, under President Carter's reorganization plan, to enforce the EPA. See, *e.g.*, *EEOC* v. *Central Kansas Medical Center*, 705 F.2d 1270 (10th Cir. 1983). This Court's decision in *Chadha*, however, spawned a number of challenges to the EEOC's enforcement authority. Employers, like petitioner, argued that the EEOC could not bring enforcement actions because the presidential reorganization plan was adopted pursuant to a statute containing an unconstitutional legislative veto provision. Two courts of appeals rejected that argument, concluding that the legislative veto provision was severable and therefore did not taint the otherwise lawful reorganization plan. See *Muller Optical Co.* v. *EEOC*, 743 F.2d 380 (6th Cir. 1984); *EEOC* v.

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by section 1 shall be considered to have been taken pursuant to a reorganization expressly approved by Act of Congress.

[2]The court of appeals also reinstated the $75,007.34 damage award (Pet. App. 20). Petitioner does not seek review of that determination.

*Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984). However, the Second Circuit concluded that the provision was not severable and that the presidential reorganization plan transferring enforcement authority from the Department of Labor to the EEOC was therefore invalid. See *EEOC* v. *CBS, Inc.*, 743 F.2d 969 (2d Cir. 1984). However, the court especially noted that Congress could validate the plan through curative legislation. *Id.* at 975-976. Congress swiftly responded by enacting Public Law 98-532, which ratified the past reorganization plan. The Third Circuit later held that Public Law 98-532 resolved any doubts concerning the EEOC's enforcement authority. See *EEOC* v. *Westinghouse Electric Corp.*, 765 F.2d 389 (3d Cir. 1985); accord *Barrett* v. *Suffolk Transportation Services, Inc.*, 600 F. Supp. 81, 82 (E.D.N.Y. 1984).

The Ninth Circuit's rejection of petitioner's challenge to the EEOC's enforcement authority thus finds support in the decisions of three other courts of appeals. The Third Circuit has ruled, like the Ninth Circuit, that Public Law 98-532 resolves any doubt concerning that authority. The other two courts have ruled that the EEOC retained enforcement authority notwithstanding the Reorganization Act's legislative veto provision.

2. As these decisions demonstrate, the court of appeals correctly rejected petitioner's challenge to the EEOC's enforcement authority. Even if it is assumed that the EEOC's original enforcement authority was infirm under *Chadha*, Congress has undoubted authority to provide a retroactive cure for that infirmity. "It is well settled that Congress may, by enactment not otherwise inappropriate, 'ratify . . . acts which it might have authorized,' see *Mattingly* v. *District of Columbia*, 97 U.S. 687, 690, and give the force of law to official action unauthorized when taken." *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S.

297, 301-302 (1937). See, *e.g., EEOC* v. *Westinghouse Electric Corp.*, 765 F.2d at 391. Congress has properly exercised that power in the present case.

Petitioner challenges the congressional ratification of the EEOC's enforcement power on due process grounds, arguing that it deprives petitioner of "substantial rights" (Pet. 9). Petitioner contends that, prior to the enactment of Public Law 98-532, "the federal courts lacked statutory jurisdiction to hear the matter" (Pet. 9-10) and that the curative legislation therefore impairs "the right of a party to adjudication in a court of competent jurisdiction" (Pet. 13). However, petitioner is plainly mistaken. The question of jurisdiction turns on a court's power to hear the lawsuit. See, *e.g., Davis* v. *Passman,* 442 U.S. 228, 239 n.18 (1979). As noted in *Westinghouse,* the federal courts have had general federal question jurisdiction over EPA claims under 28 U.S.C. 1331 since the Act's inception. See 765 F.2d at 393. See also *Andrus* v. *Charlestone Stone Products Co.,* 436 U.S. 604, 607-608 n.6 (1978) (jurisdiction under 28 U.S.C 1331 is established by a "jurisdictionally correct" complaint alleging facts "sufficient to establish such jurisdiction"). Thus, an invalidation of the 1978 reorganization plan would not have deprived the court of power to hear EPA claims.[3]

Public Law 98-532 does not impinge upon petitioner's "substantive rights." It simply ratifies Congress's approval of the 1978 reorganization plan providing that the EEOC, rather than the Secretary of Labor, should enforce the

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[3]Petitioner premises its argument on the mistaken theory that a government agency can maintain federal court jurisdiction only through 28 U.S.C. 1345, which gives the district courts jurisdiction over suits "by any agency or officer thereof expressly authorized to sue by Act of Congress." Even if petitioner's theory were correct and, further, the EEOC lacked authority to bring the suit, Congress could correct any resulting jurisdictional defect during the course of litigation. See *United States* v. *Alabama,* 362 U.S. 602 (1960).

EPA. It "confirmed and approved the exercise by [one agency] of powers originally conferred on [another]." *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. at 302 It thus represents " 'a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice.' " *Ibid.* (quoting *Graham & Foster* v. *Goodcell,* 282 U.S. 409, 429 (1931)). The passage of Public Law 98-532 did not alter petitioner's obligation to comply with the EPA; it simply eliminated any doubt that the EEOC, rather than the the Secretary of Labor, was responsible for seeking correction of petitioner's infractions.

Petitioner mistakenly compares the instant case to *Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U.S. 338 (1922). In *Forbes,* this Court held that a state legislature could not retroactively authorize the retention of a canal tax that the state had collected in error. The case thus involved " 'a bare attempt of the legislature retroactively to create liabilities for transactions . . . fully consummated in the past.' " *Swayne & Holt Ltd.,* 300 U.S. at 302 (quoting *Graham,* 282 U.S. at 429). By contrast, the transfer of EPA enforcement responsibilities from the Secretary of Labor to the EEOC, whether effected through the 1978 reorganization plan or the 1984 congressional ratification, has neither increased nor diminished the petitioner's obligation to comply with the EPA. See *Westinghouse,* 765 F.2d at 393.

3. Thus, the court of appeals' decision creates no conflict with other courts of appeals and is plainly correct. Moreover, the decision does not present an issue of continuing importance.[4] Petitioner does not dispute the EEOC's

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[4]Petitioner contends that the courts have experienced "turmoil" in distinguishing permissible from impermissible curative legislation, citing Justice White's dissent from the dismissal of an appeal in *Van Emmerik* v. *Janklow,* 454 U.S. 1131 (1982). Justice White concluded that the retroactive imposition of a utility tax raised a substantial

authority to enforce future EPA violations; instead, it only contests the agency's authority to litigate actions commenced prior to the the enactment of Public Law 98-532. There is no sound reason to require the Secretary of Labor, rather than the EEOC, to enforce the EPA during that period, particularly when Congress has unambiguously ratified the EEOC's past enforcement authority. Petitioner's arguments are unsound as a matter of law and policy and simply reflect an attempt to escape liability for past violations of the EPA.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*General Counsel (Acting)*
*Equal Employment Opportunity Commission*

SEPTEMBER 1985

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federal question, observing that this Court's prior cases have held that "adminstrative, procedural, and technical defects unrelated to the underlying policy may be remedied by curative legislation, while legislative policy may not be changed retroactively." *Id.* at 1133. The present case, involving the correction of a possible technical defect in the EEOC's enforcement authority, does not present the more troublesome issues of retroactive liability that prompted Justice White's dissent.